

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

YAVNEH DAY SCHOOL ASSOCIATION, INC. ^{1/}

Employer

and

Case 9-RC-17872

OHIO FEDERATION OF TEACHERS,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Petitioner

**ACTING REGIONAL DIRECTOR'S DECISION AND
ORDER DISMISSING PETITION**

I. INTRODUCTION

The Employer is a private non-profit corporation engaged in the operation of a school in Cincinnati, Ohio for preschool through eighth grade students. The school offers the expected general studies appropriate to the age of its students as well as Judaic studies. Essentially, the entire student body of the school is Jewish. The Petitioner has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of the Employer's professional staff. The parties agree that appropriately encompassed within the Unit would be all full-time and regular part-time professional employees, including teachers, librarians, teacher-specialists and athletic directors.

The only issue presented is whether, due to the extensive Judaic studies at the school, the school has such a substantial religious purpose and function that the Board should decline to assert jurisdiction. The Employer essentially argues that the school exists, in large part, for the purpose of instilling religious values and practices, and that it engages in religious activity to the extent that the assertion of jurisdiction would serve to raise First Amendment entanglement issues. The Petitioner argues that sensitivity to First Amendment concerns do not come into play in this case because much of Judaic studies is essentially the teaching of a culture and a language; teachers are not queried as to their religious beliefs as a condition of their employment; the school is not affiliated with any particular branch of Judaism; and the school is not operated or affiliated with a religious institution.

I have carefully considered the evidence and the arguments presented by the parties on this issue, including that contained in their briefs, and conclude that the Employer has demonstrated that the school has sufficient religious purpose and function to establish a lack of

^{1/} The name of the Employer appears as corrected at the hearing.

Board jurisdiction under *Catholic Bishop of Chicago*,^{2/} and *Jewish Day School of Greater Washington*.^{3/} Thus, as discussed in more detail below, students at the school study religious texts and learn prayers and ceremonies flowing from religious texts; many members of the Unit are directly involved in this learning process; and the articulated rationale for the existence of the school is to, in part, provide a Jewish *religious* education. Finally, I note that the Board no longer considers a school's affiliation with a particular religious institution as a determining factor in whether it should assert jurisdiction.

To provide a framework for my discussion of the issue, I will first set forth the legal context in which the Employer's activities will be considered. I will next review the facts that are relevant to the legal precedent in this area. I will then articulate in detail the reasoning that supports my determination on this issue.

II. LEGAL CONTEXT

In *NLRB v. Catholic Bishop of Chicago*,^{4/} the Supreme Court held that the Board does not have jurisdiction over lay faculty members in schools operated by a church to teach both religious and secular subjects. The Court found that church-operated schools involved "substantial religious activity and purpose" and that the "substantial religious character of these church-related schools gives rise to the entangling church-state relationships of the kind the Religion clauses sought to avoid."^{5/} The Court further recognized the "critical and unique role of the teacher in fulfilling the mission as a church-operated school." Thus, the Court concluded that Constitutional difficulties would result from the assertion of Board jurisdiction over the relationship between such teachers and their employers involving a substantial risk of infringement of First Amendment rights.^{6/} For example, if a school administrator defended against an unfair labor practice charge by relying on the school's religious mission, the Board would be required to assess whether the administrator relied, in good faith, on religious doctrine.^{7/} Accordingly, in the "absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board," the Court "decline[d] to construe the Act in a manner that could, in turn, call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."^{8/}

^{2/} 440 U.S. 490 (1979).

^{3/} 283 NLRB 757 (1987).

^{4/} 440 U.S. 490.

^{5/} Id. at 503, quoting *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

^{6/} Id. at 501-503.

^{7/} Id. at 502.

^{8/} Id. at 507.

The Board has since made it clear that it is the school's "purpose and function in substantial part . . . to propagate a religious faith" that precludes jurisdiction over teachers in such schools.^{9/} It is the "suffusion of religion into the curriculum and the mandate of the faculty to infuse the students with the religious values of a religious creed which create the conflict with the Religion clauses and not the vesting of legal title or the responsibility of operation."^{10/} Thus, the Board has found that it has no jurisdiction over teachers in schools that propagate a religious faith, even where the school is not operated by a religious denomination itself.^{11/} Therefore, the Petitioner's arguments relying upon the fact that the Employer is not affiliated with a religious institution have no grounding in current Board law.^{12/} Moreover, the Board has also found that it has no jurisdiction over teachers in religious schools, even where the teachers themselves are teaching secular classes in a manner comparable to that at secular schools.^{13/}

The Board decides on a case-by-case basis whether a religion-affiliated school has a "substantial religious character" so that asserting jurisdiction would raise a significant risk of violating First Amendment rights.^{14/} In making this determination, the Board analyzes "the purpose of the employer's operations, the role of the unit employees in effectuating that purpose,

^{9/} *Jewish Day School*, 283 NLRB at 761.

^{10/} *Nazareth Regional High School*, 283 NLRB 763, 765 (1987).

^{11/} *Id.* at 765 (fact that school is operated by a predominantly lay board, over which the Diocese has virtually no control, and faculty is composed almost entirely of lay teachers, is not controlling, where school's purpose and function in substantial part are to propagate a religious faith).

^{12/} The Petitioner notes that the United States Court of Appeals for the District of Columbia has called into question what it describes as "the NLRB's 'substantial religious character test.'" *University of Great Falls v. NLRB*, 275 F.3d 1335, 169 LRRM 2449 (D.C. Cir. 2002). Although the Petitioner, in its brief, inferred that the D.C. Circuit adopted in that case a suggested three pronged formula for evaluating whether to assert jurisdiction over an ostensible religious school, the third prong of which involves an evaluation of whether the school, "is affiliated with, owned, operated or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, by reference to religion . . .," the court did not do so, stating, "we adopt [the test] fully as to the first two steps, although we need not determine whether we reach the full expanse of the third step here." Moreover, the view of a circuit court is not necessarily the view of the Board, and my role is to follow Board precedent.

^{13/} *Trustees of St. Joseph's College*, 282 NLRB 65, 66 (1986) (although the manner in which each discipline at the College is taught is comparable to that at 'secular' colleges, its "mission is inextricably interwoven with the indisputably religious mission of the Order"). See also, *St. Edmund's High School*, 337 NLRB No. 189, slip op. at 1-2 (September 6, 2002) (assertion of jurisdiction over Catholic church and its schools unwarranted, even though the custodial employees seeking to organize perform a purely secular function: there is "close integration between the Church and the schools," the schools are part of the Church's religious mission, and the Church directly employs all of the employees seeking representation).

^{14/} *University of Great Falls*, 331 NLRB 1663, 1664 (2000), enf. denied, 278 F.3d 1335 (D.C. Cir. 2002). See also, *Jewish Day School of Greater Washington*, 283 NLRB at 761 (refusing to assert jurisdiction where employer's "purpose and function in substantial part [was] the propagation of a religious faith").

and the potential effects if the Board exercised jurisdiction.”^{15/} Thus, the Board considers such factors as the “involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty.”^{16/}

For example, the Board found propagation of a religious mission and therefore a lack of jurisdiction in *Jewish Day School*,^{17/} where the school’s articles of incorporation stated that among its central aims were to teach religious subjects “in accordance with the principles of the Jewish faith with the purpose of giving each student a thorough Jewish education,” and to establish a synagogue “for religious services in the Jewish faith.” The Board emphasized that these principles were effectuated by the substantial suffusion of religion into the curriculum, including mandatory religious instruction at all grade levels and a school policy that promoted the integration of the Judaic studies and general studies programs. The school’s purpose of religious encouragement was also demonstrated by its mandatory morning prayer services, its adherence to Jewish dietary laws, and its attempt to observe at least some traditional Jewish dress restrictions.

In contrast, the Board found that a school did not have a religious mission, and asserted jurisdiction, in *Livingstone College*.^{18/} There, the Board relied on the fact that the faculty members were not required to conform to Church doctrine or promote the ideals and objectives of the Church; nor were they prohibited from knowingly inculcating ideas that were contrary to the position of the Church on matters of faith and morals. Moreover, the Church did not interfere with the day-to-day administration of the school and did not exercise any influence with respect to course content or the selection of books. There was also no requirement that students belong to the Church; nor were faculty or students compelled to engage in worship.

Likewise, in *Casa Italiana, Language School*,^{19/} the Board held that a church run Italian language school fell outside the holding in *Catholic Bishops of Chicago* on the grounds that it was engaged in commercial rather than religious activity; this despite the fact that the school was sponsored by an individual Catholic church, the parish priest was ultimately responsible for the operation of the school, and the constitution of the school provided that its purpose was to preserve and enhance the spiritual and cultural values of Italian-Americans. In that case, prospective teachers were not questioned about their religious beliefs or practices and they provided instruction solely in the Italian language. They were specifically advised that their conversation classes should avoid any discussion of religion. The evidence presented showed

^{15/} *University of Great Falls*, 331 NLRB at 1664; *Jewish Day School of Greater Washington*, 283 NLRB at 760.

^{16/} *Id.* at 1664-65. See also, *Livingstone College*, 286 NLRB 1308, 1310 (1987).

^{17/} 283 NLRB at 761-762 (the Board found that it lacked jurisdiction even though the school was not owned or operated by a religious denomination).

^{18/} 286 NLRB at 1308-1309.

^{19/} 326 NLRB 40 (1998).

that students at the school came from many religious backgrounds and that they typically had secular rather than religious reasons for wanting to take courses in the Italian language; e.g., planning on travel to Italy.

III. SUMMATION OF RELEVANT FACTS

As noted above, the Employer is a private non-profit corporation engaged in the operation of a school in Cincinnati, Ohio for preschool through eighth grade students. The affairs of the corporation are conducted and carried out by a 36 member Board of Trustees. All board members are Jewish and two are rabbis. The by-laws of the Board of Trustees provide that the officers of the corporation comprise the Executive Committee which is to implement the policy, directives and decisions of the Board of Trustees. The by-laws also provide for a Head of School and specify, inter alia:

The Head of School shall have general charge of the affairs of the Corporation, subject to the rules, regulations, resolutions and policies of the Board and Executive Committee. The Head of School's responsibilities includes supervision of the day-to-day administration and operation of Yavneh Day School, admission, education and fundraising, community relations, finances, and discipline of students. The Head of School is responsible for establishing secular and Judaic studies curriculum and religious observance; for hiring, training, evaluation and dismissal of teachers and other employees of the Corporation pursuant to the policies of the Board

It is estimated that there are approximately 340 to 380 students who attend the Employer's single facility school. The school's recruiting brochure's "Admission" section states, "Yavneh Day School offers admission to all Jewish children." All current students above kindergarten are Jewish. An exception was made by the Executive Committee for one non-Jewish student in pre-school/kindergarten whose mother works at the school. Also, once there apparently were two non-Jewish Sabbatharians who attended for a short period of time, but this was determined to be an unsuitable situation due to certain "tension and friction and a lack of understanding" which developed.

The school teaches both what are labeled as "general studies" (traditional courses as might be found at any public school) and "Judaic studies." The "Philosophy of Education of Yavneh Day School," as set forth in its "Teacher Handbook" states in part, "The Judaic Studies Program is the 'raison d'être' of Yavneh Day School" Thus, there is a Principal of Judaic Studies who estimates that over 40 percent of students' time in the first through eighth grade is committed to this area of learning rather than to areas of general study. Teachers are considered either general studies teachers or Judaic studies teachers. With respect to the breakdown of teachers of general study versus Judaic study courses, in pre-school the kindergarten Judaic studies teacher spends 20 minute sessions with pre-school students teaching spoken Hebrew, songs, blessings and prayers. In kindergarten there are four teachers, one of whom is the teacher of Judaic studies. The 22 full and part-time teachers assigned to the other grades are equally

divided between general and Judaic study teachers. This does not include the art, music, science/technology and two physical education teachers.

The Petitioner notes in its brief that there is no unanimity of agreement as to the primacy of religion in Judaism and attempted to make the point at the hearing that Judaic studies do not necessarily equate with religious studies or involve an attempt to propagate a religious faith. As one Yavneh Judaic studies teacher testified, "Judaism is a lot of things. Judaism is the culture, our heritage, our Bible, our music, dance, singing, food. It's -- Judaism is made out of a lot of components." However, the Judaic Studies Principal testified, "I think that a lot of the, what you would call the culture, which might be ceremonial objects, a, a ceremony, foods that you eat, were all rooted in the religious foundation of Judaism." She further related that Judaic studies at the school are centered on the Torah. With respect to how the Torah is viewed, the preface to a text utilized in middle school for the study of Mishna (book of rules), in defining Mishna states, "Mishna is the oral half of the whole Torah revealed by God . . . God gives Torah day by day . . . [] [The Torah] it is not about the past and in no way concerns a book which came down to us from a particular place or time in history. It is about God's revelation which God *gives* day by day"

I accept, as argued by the Petitioner, that Judaism may encompass more than religion and that at least a portion of the Judaic studies curriculum at the school might be characterized as cultural or historical. Therefore, in my factual summary of those areas I view as involved in the Board's consideration of whether to assert jurisdiction over an arguably religious school, I will attempt to concentrate on activities that I believe would ordinarily be characterized as religious. In this regard, I do not intend to engage in a lengthy analysis of whether these activities are theocentric, but instead I accept, with only occasional discussion, that teaching directed at the age of students attending Yavneh which involves the study of religious texts, and the learning of prayers, ceremonies, and holidays flowing from religious texts, constitutes religious training.^{20/} I do not believe that I am called upon to delve into the hearts and minds of teachers or students to divine otherwise.

Somewhat relevant to the issue of the religious nature of the school is the testimony of a Yavneh Board of Trustees and Executive Committee member as to the three main branches of Judaism in the United States; Reform, Conservative and Orthodox. Orthodox Jews interpret the Torah strictly and are described as being "ritually focused." Reform Jews adopt a more liberal interpretation of the Torah and are described as not ritually focused. Conservative Jews fall somewhere between the two other groups. According to this Board/Executive Committee member, all three branches believe in one God, share common prayers and rituals and observe common holidays. All have a reverence for the State of Israel as the homeland of the Jews. All have an understanding of, and respect for, Hebrew as the language of the Jews and the people of Israel. Although the terms are not clearly defined in the record, it is apparent from the record that Jews may also define themselves as non-religious or secular Jews, and as Humanistic Jews; the first group not observing Jewish religious practices and the latter group apparently having an organized value system but not acknowledging a deity.

^{20/} I note that such religious studies as occur at Yavneh do not purport to be part of any academic comparative study of religions.

I will organize the facts underpinning my determination that the Board should not assert jurisdiction over this employer into those revealing: (1) the substantial religious purpose of the school, (2) suffusion of religion into the functions of the school and, (3) the role of Unit employees in effectuating the school's religious purpose.

(1) Religious Purpose

As the Petitioner notes in its brief, much was made at the hearing of the fact that the founding of the school was brought about in some measure by individuals who were affiliated with the Labor Zionist movement; which members are generally considered secular or non-religious Jews. I note, however, that the record reflects that the members of one founding family with ties to that movement were also members of an Orthodox Synagogue and that two of the original five incorporators were Rabbis – one Reform and one Conservative. In any event, the Articles of Incorporation of the Employer specifically state one purpose of the Employer is, “To provide the children with a combined intensive secular and Jewish *religious* education.” [Emphasis added]. In like vein, the Code of Regulations of the Employer states the purpose of the corporate entity as follows:

The primary purpose of the corporation is to serve the needs of the Jewish community of Greater Cincinnati by operating a state accredited, progressive Jewish day school; combining Jewish *religious* and cultural instruction and Hebrew language instruction with an excellent general studies program, which are designed to instill in its pupils a love for and loyalty to the United States of America, and a love and commitment to the State of Israel and the Jewish People. [Emphasis added].

Speaking to policy, which under the Employer's corporate structure is to emanate from the Board of Trustees and be implemented by the Executive Committee, the Board Member/Executive Committee member who testified in these proceedings relates that Yavneh's Board, “is charged with a number of things. And one of those is to ensure that this statement of purpose is fulfilled and that the children and the parents of the children who attend the school do in fact benefit from an intensive secular and Jewish *religious* education.” [Emphasis added]. A nominating committee of the Board of Trustees nominates individuals to fill vacancies that occur on the Board. The nominees are then voted on by the entire Board. As noted by the Petitioner in its brief, there is no religious affiliation requirement for Board membership specifically set forth in the by-laws. In practice, however, according to the testimony of the Board Member/Executive Committee member, “Some of the criteria that are considered when inviting individuals onto the board are whether or not they are in tune with the Jewish *religious* needs, wants and desires of the community, whether they are actively participating in the Jewish Federation campaign to raise funds, things like that.” [Emphasis added]. Thus it appears clear that although there may be a cultural component to Judaic studies, at least one intended purpose of the school is to provide “Jewish religious” instruction.

(2) Suffusion of Religion into the Functions of the School

The record reflects that a Curriculum Guide for Judaic Studies is given to, among others, teachers. It sets forth an outline of what, in general, is hoped to be achieved at each grade level in the study areas of, Tanach (Hebrew Bible), Hebrew language, Tefillah (prayer recitation from the traditional Orthodox/Conservative prayer book), holidays, Jewish enrichment, Jewish/Biblical history, and Rabbinics (Rabbinical interpretations of the Torah). The document clearly indicates an intent to extensively train students at all levels of the school to participate in Jewish ceremonial and prayer life, and the record reflects that these subject areas are in fact taught by the Judaic studies teachers. Student progress reports contain a grade for areas incorporating these subjects. Apparently, as with all goals, the ones outlined in the Curriculum Guide for Judaic Studies are not all necessarily completely achieved, but it seems that the only area in which the level of accomplishment hoped for is not always attained is in the curriculum area involving the study of Hebrew; the reading of which requires learning an entirely different symbol structure from the Roman alphabet. It is hoped that by the upper grades the study of texts will be entirely in Hebrew.

Hebrew is taught in both the biblical and more modern form as spoken currently in Israel. With respect to why the study of Hebrew falls within Judaic studies, while Latin and Spanish (which are offered only in the seventh and eighth grades, contrary to the teaching of Hebrew in some form at all levels) do not, the Judaic Studies Principal testified that, "Hebrew is really the key to opening up all our -- our texts that are so much a part of being Jewish. Of being able to read in the original the Torah and the Talmud, being able [to read] all the books of -- sayings of our Fathers. [] [They are] Religious text. It's also a very important connection with the land of Israel." A Judaic studies teacher in her testimony referred to Hebrew as a "Holy Language" and described the revival of Hebrew as a modern language as being a "true miracle." Prayer books are written either in part (for the lower grades) or entirely (for the upper grades) in Hebrew. Each student receives a prayer book. As students progress through the upper grades, Judaic studies courses are taught as much as possible in Hebrew. Also prayers, blessings and services at the school are conducted in Hebrew.

While there is apparently only one Rabbi currently on the school's staff as a part-time employee, a Rabbinic Advisory Council works with the Judaic studies program. The Council consists of four Rabbis – two Conservative and two Reform. There seemingly would be no objection to an Orthodox Rabbi serving on the Council, but there is another school operated in the Cincinnati area that is apparently viewed more favorably by the Orthodox Rabbis. There is also a Humanistic Rabbi in the Cincinnati area. The Judaic Studies Principal testified that she could not conceive of a Humanistic Rabbi ever being invited to serve on the Rabbinic Advisory Council, since "belief in God is definitely part of our being." The Rabbinic Advisory Council meets approximately once or twice a semester. Its members help arrange for Rabbis from each of the three main branches of Judaism to lead programs with the students. The council also acts as a liaison to the Jewish congregations which Yavneh students may attend, seeking to integrate Yavneh students into the youth programs of their congregations. This is apparently because Yavneh students ordinarily do not attend the Sunday schools operated by the synagogues, ^{21/}

^{21/} Classes are held on Sundays, after the Sabbath has ended.

since what is taught there would be duplicative of what students would have already learned at Yavneh.

The Yavneh school facility incorporates a synagogue on the second floor and a chapel on the first floor. In the synagogue are found seven stained glass windows depicting the seven days of creation from the biblical Genesis account and the Aron Kodesh (Holy Ark) containing three Torah scrolls. In the chapel is a simpler ark containing two Torah scrolls. Tallit (prayer shawls) are available in both.^{22/} The Ten Commandments are depicted in some form in both.

Prayer services for the fourth, fifth and sixth grade students take place 4 days a week in either the chapel or synagogue, the other day of the week they take place in the classrooms. All students in these grades attend the prayer services. The upper grades also conduct services in either the chapel or synagogue, but it is unclear how often. The lower grades pray in their classrooms. All levels of students at the school engage in prayer and blessings at the beginning of the day, as well as before and after meals and snacks. During meals and at services all male students are required to wear a kippah (small head covering), and some female students also choose to do so.

The Petitioner notes that the school is designed to appeal to all three main branches of Judaism. This does not mean, however, that the prayers and services are made sterile or homogeneous. Rather, prayers at the school are from the traditional prayer book utilized by Conservative and Orthodox Jews.

The school cafeteria is kosher; i.e., run according to the laws of Kashruth (Jewish dietary laws). According to the Board Member/Executive Committee member who testified, these laws are based on the Torah. While it appears that teachers and staff may be free to eat non-kosher food in the teachers' lounge or in the privacy of their offices, no non-kosher food may be given to children or served during any school function – including during field trips. This restriction is enforced by the requirement that anything brought to school which is to be consumed by students must be in sealed packaging which indicates on its face that it is kosher.

The Jewish Sabbath begins at sundown on Friday evening and extends through Saturday evening. At least Orthodox Jews place a severe limitation on activity not related to worship during this time period; e.g., absolutely no work may be performed and cars may not be driven. No Yavneh field trips or extracurricular activities are scheduled on the Sabbath. For example, Yavneh has a basketball team for boys in the sixth, seventh and eighth grades which participates in a Cincinnati metro league. One of the conditions which had to be arranged for Yavneh's participation in this basketball league was that there would be no games played on Friday night or Saturday.

^{22/} There are minor misspellings in the record which I have corrected herein utilizing certain general resources. For example, in the record "tallit" is incorrectly spelled as "talit." I have not relied upon these sources in my evaluation of the religious nature of any activity or the tenets of Judaism, but have limited myself to what was explained in the record in this matter.

The school is closed for all or part of the Jewish holidays (holy days) of Rosh Hashanah (celebration of the Jewish New Year), Yom Kippur (annual Jewish observance of fasting, prayer and repentance), Sukkot (festival of giving thanks for the fall harvest – the school is only closed two of the seven day holiday), Shmini Atzeret, (serves to connect the end of the seven day Sukkot and the beginning of Simchat Torah), Simchat Torah (celebrates the completion of the annual reading of the Torah), Pesach (Passover) and Shavuot (marks the giving of the Torah at Mount Sinai coupled with an agricultural component concerning the grain harvest). The school attempts to participate in students' preparation for the holidays through such activities as teaching appropriate prayers and songs.

The school is not closed for other Jewish holidays -- apparently the criteria for closure being whether it is a holiday from the Torah -- which are nevertheless commemorated. With respect to Hanukkah, ^{23/} the whole school participates in the candle lighting and songs associated with the holiday. Students participate in Purim (the reading of the Book of Esther). The school observes Yom HaShoah (Holocaust Day) with a memorial/prayer service for the victims of the Holocaust. The school conducts special prayers on Yom Hazikaron (day in memory of Israeli soldiers who died protecting the state of Israel) and Yom Ha'Atzmaut (Israeli Independence Day).

No particular area is reserved for Judaic studies and classrooms with Judaic studies teachers are interspersed with those of other teachers. Symbols associated with Jewish holidays, such as Hanukkah, are depicted not only in Judaic classrooms, but also in the lobby and halls of the school. It also appears that at least some general studies classrooms are decorated with Jewish holiday symbols. A quote from the Talmud (written collection of originally oral Rabbinical texts) appears in the lobby inside the main entrance to the school. Affixed to the doorpost of the office of the Principal of Judaic Studies is a mezuzah -- a small box which contains a parchment setting forth the Shema, a prayer that is an affirmation of the Jewish faith's belief in God. There is a gift shop in the school building run by the Parent/Teacher Organization. The shop sells items used in Jewish ritual such as tallit, candlesticks, wine cups for Sabbath and Havdalah candles (used in the ritual and prayers at the end of Sabbath). In addition, the gift shop will sell more general items made in Israel. Profits from the shop are given to the school.

The school maintains a dress code for students, a part of which states:

4. Hats are not permitted inside the school building. Boys are expected to wear a special kippah at school.
5. **Every Friday:** To acknowledge the coming of Shabbat, students will be expected to wear special clothing on Fridays.

^{23/} While not closed because of Hanukkah, the school is not in session when the area public schools are closed for the Christmas/New Years break, which may overlap to some extent the eight days of Hanukkah. It is explained that the school is closed during the public schools' Christmas/New Years break because the elder siblings of many Yavneh students attend the area public high school. Families often wish to take trips during this time and it was felt that children would be pulled from school whether or not Yavneh was closed.

Tops: Solid-colored, collard shirts which button down the front, turtlenecks, or front-button, knit style shirts are allowed. All tops must have sleeves.

Bottoms: Any solid colored pants or shorts tailored with belt loops and zipper are acceptable. Denim and Capri-style pants and skirts may be worn.

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(3) Role of Unit Employees in Effectuating Religious Purpose

Both general studies and Judaic studies teachers enter into contracts for the school year. Found in the contract is the statement, “I agree to abide by the Code of Personnel Practices and Teacher Handbook of the School” The contract further states, “This Contract together with the Code of Personnel Practices and the Teacher Handbook shall constitute the entire agreement between the School and me.”

The Teacher Handbook contains a section on the knowledge, skill and attitudes it is hoped that teachers will instill in the school’s students. The subsection on “Skills” emphasizes the study of Hebrew and explains the rationale for students’ acquisition of that skill. To wit:

The child will be able to read and comprehend passages from the Bible, the prayer book and other classical Jewish texts. It is our hope that, by eighth grade, students who have completed the Yavneh program will have attained a level of Hebrew fluency, will be able to daven [pray] in a variety of prayer services and be able to actively participate in Torah/Bible study.

This section of the Teacher Handbook also contains a subsection on “Attitudes,” which states, inter alia:

The child will continue to develop his/her concept of God. []
The child will experience excitement in the study of Torah and will desire to continue learning throughout his/her life. []
The child will want to support Jewish causes and participate in the religious and social life of the Jewish community.

The Teacher Handbook contains a section on “Homework” which states, inter alia:

Homework should not be assigned either by Judaic or General Studies teachers over a Jewish holiday where there is no non-holiday time available for writing. Thus, if Sukkot were to come on a Tuesday and Wednesday, no work may be assigned since there is no non-holiday time during which it might be written.

However, weekends are appropriate for homework since Sunday is available.

Another section of the Teacher Handbook is headed “Lunchroom.” It contains the following statements:

- Birkat Hamazon [chanted or sung grace after meal] should be started only after the children are quiet. It will be sung in a dignified manner appropriate to its prayer content.
- No male may eat without a kippah. It is the responsibility of all morning teachers to make sure that the boys are wearing kippot [plural of kippah] when they leave the classrooms to go to lunch.

A section of the Teacher Handbook headed “Kashruth and Religious Observance” states:

Teachers are reminded of the school’s kashruth policy which includes:

- The maintenance of kashruth standards in the classroom through the use of only approved and unopened items for special activities.
- All baked goods must come from approved sources.
- No foods prepared at student or staff homes are permissible for general distribution.

If you have any questions concerning the kashruth policy, check with the office.

All boys are expected to wear kippot at all times in Judaic Studies and whenever eating, even in General Studies.

(i) Judaic Studies Teacher

The two Judaic studies teachers who testified in these proceedings are originally from Israel. It seems that neither was questioned about her religious background before being hired. Both describe their backgrounds as secular or non-religious Jews. It appears, however, that this self-definition arises from a frame of reference which characterizes a religious Jew as one who is Shomer Shabbas (observes the prohibitions on many activities on Sabbath) and who strictly follows the laws of Kashruth (keeps kosher). Thus, even a devout Reform Jew would not be viewed as religious by some standards. In any event, both teachers appear to adhere to the curriculum mentioned above, including the teaching of prayers and the study of the Torah and other religious texts. Neither appears to debunk the teachings contained therein and the worst that may be found in the record is the direction of a student to their Rabbi, or a shift to a more Socratic method of teaching, in a situation where a teacher thought her personal view might not

comport with a text. In any event, one of these two teachers testified, “I do teach religion;” the other agreed that what her activities were intended to do was inculcate in her students a support for Jewish causes and a desire to participate in the religious and social life of the Jewish community.

Moreover, Judaic studies teachers are not free agents. They work under the direction of the Judaic Studies Principal and must submit their lesson plans to her. The Judaic Studies Principal in turn, “expect[s] teachers to teach a belief in God and a reverence for God and a reverence for the Torah as being the Word of God. . . .” Furthermore, a Yavneh Board/Executive member testified that if a Bible studies teacher at the school wanted to use a textbook that deconstructed the Bible and taught that it contained “simply myths and fairy tales” the Board of Trustees would not allow it.

The Judaic Studies Principal relates that she will confer with the Judaic studies teachers and outline what should be taught in the various areas of Judaic studies. This includes textbook selection; although it does not appear that she has ever overruled a teacher’s choice. She will also monitor Judaic studies classrooms. She formally evaluates the Judaic studies teachers. The evaluation form, which is the same one utilized by other administrators in their evaluation of the general studies teachers, essentially rates lesson plans and how well they are implemented.

(ii) General Studies Teachers

Not all general studies teachers are of Jewish heritage. It appears that they are not queried as to their religious beliefs as part of the hiring process. The interim Head of School and Middle School Principal (grades 6-8) are not Jewish. As might be expected, the Judaic Studies Principal is Jewish, as is the Pre-School Director.

There has seemingly been some dissatisfaction expressed by parents regarding the amount of time spent on Judaic studies as compared to general studies. Therefore, last academic year somewhat more time was given to such subject matter as computers and science, which was taken from Judaic studies time. However, an effort was made to integrate more Judaic studies material into the general studies classes and a Director of Integrated Curriculum was appointed for the year. This integration is reflected in such activity as collaborative efforts to publish Hebrew-English stories; the teaching of Hebrew words incorporated into general subject matter; the incorporation of the consideration of a Jewish background in the study of scientific, historical and artistic figures; the exploration of the Jewish roots of certain more widely celebrated holidays; and the utilization of computer class time to design a Hanukkah card. Moreover, it appears that the art teacher often incorporates Judaic themes and the music teacher is involved in the teaching of the “trop” (a form of cantillation or chant utilized in services and at a Bar/Bat Mitzvah ceremony). One area of a teacher’s evaluation is “commitment to curricular integration.”

Part of the general studies teachers' lunchroom responsibility is to assist in leading Jewish religious blessings before and after meals and to monitor the male students wearing kippot. It appears that they will also attend after school functions such as the Kabbalat HaTorah, -- a

ceremony or program involving the presentation of the first of the five books of the Torah to second grade students.

In addition, preschool and kindergarten general studies teachers are more involved than upper level general studies teachers in areas that touch upon Judaic studies. For example, the former utilize Jewish holiday themes in their arts and crafts, might teach something about the holiday, and a model Passover Seder is performed in kindergarten class. They will also do prayers and blessings with their students.

(iii) *The Librarian*: ^{24/}

The school has a part-time librarian. She is also the librarian at two synagogues. She determines which books the school library will purchase each year. She submits purchase orders to the Head of School, but does not believe any religious authority reviews her purchasing decisions.

The school has a library of approximately 7,000 volumes of reading material, an estimated 15 percent of which are characterized as Judaic related material. These include Jewish religious texts; texts on Jewish and American history; works on the Holocaust; books relating Jewish folklore, holidays and customs; encyclopedic works; and Bible stories for the younger students. The librarian is made aware of what books she might wish the school to purchase not only through the “School Library Journal” (a publication intended to inform school librarians of available selections) but also through a publication from the Association of Jewish Librarians, of which she is a member.

IV. ANALYSIS

I find abundant evidence that a substantial part of the Employer’s purpose and function is the propagation of the Jewish faith, that religious instruction is in fact suffused throughout the functions the Employer seeks to carry out, and that members of the Unit are extensively involved in infusing the Jewish religion into the students’ educational experience such that the assertion of jurisdiction would create the Constitutional difficulties outlined by the Supreme Court in *NLRB v. Catholic Bishop of Chicago*. ^{25/} Indeed, there appears little to distinguish this case from *Jewish Day School of Greater Washington*, ^{26/} other than the Petitioner interjecting the argument that Judaic studies may be viewed as more of a cultural than religious undertaking. Thus, as found in *Jewish Day School of Greater Washington*, Yavneh’s articles of incorporation state a religious purpose; a synagogue is incorporated into the school; 40 percent of a student’s time is spent in Judaic studies which includes, in addition to what is clearly religious activity such as the teaching of prayers, the study of Hebrew and Jewish history; religious services and ceremonies

^{24/} No information appears in the record regarding the teacher-specialists and athletic directors, whom the parties also agree would be appropriately encompassed in a unit of professional employees.

^{25/} 440 U.S. 490.

^{26/} 283 NLRB 757.

are conducted at school; prayer is required; an integration of the general studies and Jewish studies program has been attempted; Jewish dietary laws are observed; Jewish holidays are studied and observed; and there is an attempt to observe at least some traditional Jewish dress restrictions.

One distinction the Petitioner attempts to draw between *Jewish Day School of Washington* and the instant case, is that in *Jewish Day School* separate services were held for the Orthodox, Conservative and Reform students. At Yavneh, it is not that Jewish teachings and prayers are diluted to make them ecumenical, rather, Orthodox/Conservative services/prayers are used. As explained by the Judaic Studies Principal, this is because while a Reform Jew may not follow certain prescriptions, an Orthodox Jew must.

It appears that the only real factual distinction between the instant case and *Jewish Day School of Greater Washington* is the Petitioner's evidence that the subject matter taught by Judaic studies teachers here may be viewed by at least certain instructors as cultural rather than religious. As I have previously noted, it is not appropriate for me to attempt to ascertain whether the purveyor of instruction has a religious intent. I must consider whether the nature of the material, coupled with the context in which it is presented, indicates that it is religious indoctrination.^{27/} In the instant case, the material taught is specifically referred to as sacred and holy; includes prayers and religious ceremonial instruction centered on a deity; and does not purport to be part of a mere academic exercise, but instead is clearly an attempt to inculcate religious values and teach religious services and prayers that students will be able to practice outside and beyond the school.

Based on the foregoing, I conclude that an attempt to apply the Act to this employer and its employees would involve a serious risk of entangling the First Amendment with Board processes. I, therefore, find that the Board does not have jurisdiction over the Employer and will dismiss the petition.

V. CONCLUSION AND FINDING

Based upon the entire record in this matter and in accordance with the discussions above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. It will not effectuate the purposes of the Act to assert jurisdiction in this case.

^{27/} See, e.g., *Stone v. Graham*, 449 U.S. 39 (1981) (despite an avowed secular purpose, state statute requiring posting of the Ten Commandments on walls of schools was activity which was plainly religious in nature and in conflict with the first amendment). *Arlington School District v. Schemp*, 374 U.S. 203 (1963) (Court held daily reading of Bible verses and the Lord's Prayer in the public schools was religious activity despite the school district's assertion of such secular purpose as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature.")

VI. ORDER

The petition filed in this matter is hereby dismissed.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **February 6, 2004**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 23rd day of January 2004.

/s/ Earl L. Ledford

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